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RESCISSION FOR BREACH OF WARRANTY.

A DISPUTED question in American law is whether a buyer who has purchased goods with a warranty may return the goods and rescind the sale if the warranty is broken. According to the English law, he may not,[1] but in Massachusetts from an early day it has been continuously held that such rescission is allowable.[2] The authorities in this country in recent times have been divided. Though the text-writers have not generally recognized the fact, nearly as many courts[3] have fol-

[1] Street *v.* Blay, 2 B. & Ad. 456; Gompertz *v.* Denton, 1 Cr. & M. 207; Dawson *v.* Collis, 10 C. B. 523; Sale of Goods Act, Secs. 11 (1) (*b*), 53 (1), 62 (1). Before the decision of Street *v.* Blay, the English law was supposed to allow rescission; Lord Eldon had so ruled in Curtis *v.* Hannay, 3 Esp. 82.

[2] Bradford *v.* Manly, 13 Mass. 139; Perley *v.* Balch, 23 Pick. 283; Dorr *v.* Fisher, 1 Cush. 271, 273; Bryant *v.* Isburgh, 13 Gray 607; Smith *v.* Hale, 158 Mass. 178; Gilmore *v.* Williams, 162 Mass. 351, 352. At the outset the Massachusetts Court simply followed what was then regarded as the English law, but refused to change its ruling after the decision of Street *v.* Blay.

[3] ALABAMA. Pacific Guano Co. *v.* Mullen, 66 Ala. 582; Thompson *v.* Harvey, 86 Ala. 519; Hodge *v.* Tufts, 115 Ala. 366.

CALIFORNIA. Polhemus *v.* Herman, 45 Cal. 573; Hoult *v.* Baldwin, 67 Cal. 610 (*conf.* Cal. Civ. Code, § 1786).

IOWA. Rogers *v.* Hanson, 35 Ia. 283; Upton Mfg. Co. *v.* Huiske, 69 Ia. 557; Eagle Iron Works *v.* Des Moines Ry. Co., 101 Ia. 289.

LOUISIANA. Code, Art. 2520; Flash *v.* American Glucose Co., 38 La. Ann. 4 (based on the Civil Law).

KANSAS. Craver *v.* Hornburg, 26 Kan. 94; Weybrich *v.* Harris, 31 Kan. 92; Gale Mfg. Co. *v.* Stark, 45 Kan. 606.

lowed the Massachusetts rule as have followed the English law.[1]

It may aid in determining which opinion is supported by the better reason to remember that a warranty is simply a promise, and to analyze briefly the nature of the obligation.

In the early law in order to make out a warranty it seems to have been necessary to use the word "warranty," or at least some equivalent,[2] but now an express affirmation, whatever form it takes, is

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MAINE. Cutler *v.* Gilbreth, 53 Me. 176; Milliken *v.* Skillings, 89 Me. 180. See also Noble *v.* Bushwell, 96 Me. 73.

MISSOURI. Branson *v.* Turner, 77 Mo. 489; Johnson *v.* Whitman Works, 20 Mo. App. 100; Kerr *v.* Emerson, 64 Mo. App. 159; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Edwards *v.* Noel, 88 Mo. App. 434.

NEBRASKA. Davis *v.* Hartlerode, 37 Neb. 864. See also McCormick Co. *v.* Knoll, 57 Neb. 790.

NORTH DAKOTA. Canham *v.* Plano Mfg. Co., 3 N. Dak. 229 (*conf.* N. Dak. Civ. Code, § 3988).

OHIO. Byers *v.* Chapin, 28 Ohio St. 300.

WISCONSIN. Boothby *v.* Scales, 27 Wis. 626; Croninger *v.* Paige, 48 Wis. 229; Warder *v.* Fisher, 48 Wis. 338; Minn. Threshing Co. *v.* Wolfram, 96 Wis. 481; Parry Mfg. Co. *v.* Tobin, 106 Wis. 286; Optenburg *v.* Skelton, 109 Wis. 241, 244.

See also Sparling *v.* Marks, 86 Ill. 125; Mader *v.* Jones, 1 Russ. & Chesley (Nova Scotia) 82.

[1] UNITED STATES SUPREME COURT. Thornton *v.* Wynn, 12 Wheat. 183; Lyon *v.* Bertram, 20 How. 149.

CONNECTICUT. Trumbull *v.* O'Hara, 71 Conn. 172; Worcester Mfg. Co. *v.* Waterbury Brass Co., 73 Conn. 554.

GEORGIA. Woodruff *v.* Graddy, 91 Ga. 333; Ga. Code, § 3556.

ILLINOIS. Crabtree *v.* Kile, 21 Ill. 180; Owens *v.* Sturges, 67 Ill. 366; Kemp *v.* Freeman, 42 Ill. App. 500 (but see *contra* Sparling *v.* Marks, 86 Ill. 125).

INDIANA. Marsh *v.* Low, 55 Ind. 271; Hoover *v.* Sidener, 98 Ind. 290; Wulschner *v.* Ward, 115 Ind. 219, 222.

KENTUCKY. Lightburn *v.* Cooper, 1 Dana, 273.

MICHIGAN. H. W. Williams Transportation Line *v.* Darius Cole Transportation Co., 88 N. W. Rep. 473.

MINNESOTA. Merrick *v.* Wiltse, 3 Minn. 41; Lynch *v.* Curfman, 65 Minn. 170 (*conf.* Close *v.* Crossland, 47 Minn. 500).

NEW YORK. Voorhees *v.* Earl, 2 Hill 288; Cary *v.* Greeman, 4 Hill 625; Muller *v.* Eno, 14 N. Y. 597; Day *v.* Pool, 52 N. Y. 416; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 260, 269.

PENNSYLVANIA. Kase *v.* John, 10 Watts 107; Freyman *v.* Knecht, 78 Pa. 141; Eshleman *v.* Lightner, 169 Pa. 46.

SOUTH CAROLINA. Kauffman Milling Co. *v.* Stuckey, 40 S. C. 110.

SOUTH DAKOTA. Hull *v.* Caldwell, 3 S. Dak. 451.

TENNESSEE. Allen *v.* Anderson, 3 Humph. 581.

TEXAS. Wright *v.* Davenport, 44 Tex. 164.

VERMONT. Hoadly *v.* House, 32 Vt. 179; Matteson *v.* Holt, 45 Vt. 336.

ONTARIO. Mooers *v.* Gooderham, 14 Ont. 451.

[2] See 2 HARV. L. REV. 9.

generally held to amount to a warranty.[1] It is ordinarily said that a warranty is a collateral promise, and the name condition has been applied, not very happily, to a promise which forms in terms part of the description of the goods. In the time of Chandelor *v.* Lopus[2] it is probably true that a warranty was necessarily collateral. But under the present English law it is not true that a warranty is in form always collateral. When A agrees to sell B a horse and adds "I warrant him sound," the warranty is collateral in form. When, however, A contracts to sell B a sound horse, there is no collateral promise, yet if A delivers to B an unsound horse and B takes title to him, A is a warrantor of the horse's soundness, with precisely the same consequences as in the first case.[3] Further, suppose that specific goods are sold under a description. A buyer asks for "strap-leaf red top turnip seed,"[4] or "large Bristol cabbage seed,"[5] or "rape seed,"[6] or bulbs of a named variety.[7] No agreement to sell precedes the actual sale, but when the seller furnishes goods he is held to warrant that the goods are of the kind asked for. Yet the description can hardly be called collateral in form. On the other hand, in case of an executory contract, even though A puts his promise in a clearly collateral form, B may presumably reject the horse in precisely the same way as if the promise of soundness had been part of the description.[8] It is thus immaterial whether the promise is

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[1] Mechem on Sales, § 1235.

[2] Croke, James, 4.

[3] Sale of Goods Act, sec. 11 (1) (*a*). See too Mechem on Sales, § 1334, *n.* 1, § 1393. This is not law in New York and some other states. Mechem, § 1392.

[4] Wolcott *v.* Mount, 30 N. J. Law 262.

[5] White *v.* Miller, 71 N. Y. 118.

[6] Hoffman *v.* Dixon, 105 Wis. 315.

[7] Edgar *v.* Breck, 172 Mass. 581. There was in this case an agreement to sell before the completed sale. See further Mechem, § 1334. These are American cases, but the English law is presumably the same. See Allan *v.* Lake, 18 Q. B. 560. Compare, however, Varley *v.* Whipp, [1900] 1 Q. B. 513.

[8] This is not expressly so provided in the Sale of Goods Act; and perhaps the contrary is implied. In Dawson *v.* Collis, 10 C. B. 523, also the court criticised a statement in Smith's Leading Cases that the buyer might refuse to receive the goods. The right of the buyer to refuse the goods, however, is still asserted in Smith's Leading Cases (10th Eng. Ed.) 26. In this country the buyer would probably be allowed to refuse the goods even by courts which do not allow rescission for breach of warranty, in the case of an executed sale. Mechem on Sales, § 1802, n. 5. Sec. 11 (1) (*b*) of the Sale of Goods Act provides that "a stipulation may be a condition, though called a warranty in the contract." This provision would doubtless enable a court to hold the buyer justified in refusing the goods. Certainly it seems incredible if a dealer said "I will sell you a piano which I will select for you and which I will warrant per-

collateral or not, and the distinction taken between conditions and warranties has probably caused more confusion than assistance. The essential thing under the English law is whether the contract is executed or executory. If it is executed, the buyer must seek redress in an action or counterclaim for damages, or in recoupment when sued for the price; if executory, the buyer may accept the goods, retaining his claim for damages, or he may reject the goods. Doubtless it is true that in the case of an executed sale the promise will generally be collateral in form, while in the case of an executory sale it will generally form part of the description of the goods. But neither of these propositions is invariably true. A may agree to sell goods next week, warranted sound, and he may transfer title to-day to goods ordered by description.

This statement of the English law will also serve as a statement of the law of warranty of most of the states in this country which do not allow rescission for breach of warranty. New York, however, has a long series of decisions developing a distinction between conditions and warranties which do or do not survive acceptance. Under the New York law it is clear that generally, if the promise of kind or quality forms part of the description of the goods and the buyer accepts the goods, he has lost all rights under the promise, while if the promise is collateral in form, the buyer has not only the right to reject and then sue for damages, but also the right to accept the goods and nevertheless sue for damages. The distinction between so-called conditions and warranties has in New York, therefore, a real importance. Whether this distinction exactly corresponds with the distinction commonly taken between conditions and warranties, or whether there are not cases where the obligation of a promise which forms part of the description of the goods will survive acceptance of the goods and cases where the obligation of a promise collateral in form will not survive acceptance, it is unnecessary to inquire here, and the question may be left to the determination of local specialists.[1] The decisions of the New York court have had some influence on the decisions of other states, but the weight of authority clearly favors

fect in every respect" and a buyer accepted the offer, that the dealer could hold the buyer bound to accept an imperfect piano and rely on an action for damages. If such is the English law, that circumstance may detract somewhat from the effect of the criticism of this article upon the propriety of different names for warranties and for descriptive words. The criticism of the English law, however, apart from its nomenclature, will gain added force from so shocking a result.

[1] See an article by Professor Burdick, in 1 Columbia Law Review, 71.

the English rule, that acceptance of the goods does not bar an action for damages because the goods are not of the agreed kind or quality, whether the seller's promise was collateral in form or was part of the description of the goods.[1]

The objections and the advantages of allowing rescission for breach of warranty may be considered under two headings, theoretical and practical.

The theoretical objections to the remedy are, that rescission is not allowable in the case of an executed contract in any event, and, further, that as a warranty is collateral to the main transaction, breach of the warranty cannot affect the validity or finality of the transfer of title. The two transactions, it is said, are in their nature separate and distinct. The objection that rescission should not be allowed for breach of a promise in any executed contract, finds support undoubtedly in the early law of England, and indeed in the law of England to-day; but the same cannot be said of the law in this country, and in a discussion of correct legal principle it is not unworthy of remark that the law on the Continent of Europe generally allows rescission in such cases. Aside from the possible conflict with the law as it actually exists, there is no intrinsic objection to allowing rescission and restitution on account of breach of any essential promise, if the parties can be put in *statu quo* or substantially so. The desirability of such a remedy depends purely on the business customs of a community and on whether it appeals to the natural sense of justice. Do merchants who value their reputation for fair dealing take back goods which they have untruthfully, though innocently, asserted possessed particular qualities? Do reasonable buyers who have bought goods under such circumstances expect the seller to take back the goods and refund the price? These are the essential inquiries, and there can be little doubt of the answers. Nor is the state of the law such that allowance of the remedy in question would violate fixed principles or analogies. On the contrary, it would follow the tendency of the law. It is a striking fact that both in the Civil law and in the Common law rescission has been increasingly allowed during the past century as a remedy for breach of contract.

Both the Roman law and the English law began by denying the remedy altogether in the case of both executory and executed

[1] Mechem, § 1392 *seq.*

contracts. By a gradual process, as law has become more ethical, under both systems the remedy has been extended.[1] The most apposite illustration is furnished by the rules applied where the buyer, instead of the seller, makes default in the performance of his obligations, after title has passed. This case is the converse of breach of warranty. The seller is generally allowed in this country, if he still retains possession of the goods to rescind the sale and keep the goods as his own, or to dispose of them to another buyer, if the original buyer proves insolvent or otherwise makes default in the obligations of the contract of sale. The seller is given similar rights where goods are stopped *in transitu.* This right of rescission on the part of the seller does not seem to exist in England, and has been somewhat criticised by text writers, but it appears to be uniformly law in this country.[2] It can hardly be doubted that the American rule is justified by business convenience. If a buyer purchases goods and the title passes, but the price is unpaid and the seller retains possession, is it just to the seller to require him to hold the goods forever for the buyer's benefit? This result, though a logical consequence of the English law before the Sale of Goods Act,[3] is not reached anywhere. The seller may certainly resell the goods.[4] This may be called not a rescission but a foreclosure of the lien. Suppose, however, that the seller realizes more by the resale than by the original sale. May the buyer claim the surplus? Would it be thought fair in a mercantile community that a buyer should after default get the benefit of such a chance? Those who drew the Indian Contract Act thought not,[5] and in this country it can hardly be questioned that the buyer would not get the surplus.[6] In England the result would be more doubtful.[7] If the buyer cannot get the surplus, the result is explicable only on the theory that the seller has the power to rescind the sale. Suppose, further, that the seller does not make a resale,

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[1] See 14 HARV. L. REV. 317 *seq.*; Moyle, Contract of Sale in the Civil Law, 190; 13 HARV. L. REV. 85, 86, 94–97.

[2] See Mechem, §§ 1681, 1682; Burdick on Sales, p. 243.

[3] Martindale *v.* Smith, 1 Q. B. 389; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. at p. 145, *per* Lord Chelmsford.

[4] Sale of Goods Act, Sec. 48 (3).

[5] Indian Contract Act, Sec. 107. "The buyer must bear any loss," but he "is not entitled to any profit which may occur on such resale."

[6] See Mechem, §§ 1681, 1682; Burdick, p. 243.

[7] See Ogg *v.* Shuter, L. R. 10 C. P. 159, 1 C. P. D. 47; Mirabita *v.* The Imperial Ottoman Bank, 3 Ex. D. 164.

but on the buyer's default keeps the goods himself and uses them. Has he converted the buyer's property? If the buyer made default would not any merchant be likely simply to put the goods back into his stock? May the buyer come in at any time and claim them if they appreciate in value? Such a rule would be both inconvenient and unjust.[1]

It may be urged, however, that even if we grant that rescission is a proper remedy for breach of contract and even of an executed contract, it should not be allowed in the case of breach of warranty, because a warranty is a collateral obligation. As has already been shown, a warranty in the English law is not always collateral in form. A promise which forms part of the description becomes a warranty when title passes. Still it is doubtless true that the typical warranty is collateral. Thus, a seller may sue for the price of a horse which he has sold and warranted sound without alleging in his declaration anything about the warranty.[2] From this the inference may be drawn, that the price of the horse is promised in return for the transfer of title, and that the warranty is a collateral promise of which the consideration is not the price but the sale. This is doubtless the form the transaction takes, but the collateral character of the warranty is only formal. After reflection, no one can doubt that in such a bargain the inducement for the payment or promise to pay the price is in part, and in an essential part, the giving of the warranty. The form which the transaction takes justifies the court in applying the rules of pleading and procedure applicable to collateral stipulations and conditions subsequent; that is, the plaintiff need allege nothing about the matter,

[1] The analogy between the case suggested and that of a sale or mortgage of real estate may seem troublesome at first sight. A court of equity allows the buyer or mortgagor to fulfil his contract after long delay, only requiring payment of interest on the delayed purchase money or debt. But the seller or mortgagee has his remedy. At any time he may foreclose the rights of the party in default by filing a bill for specific performance or for foreclosure. Bills for specific performance or foreclosure are not allowed to enforce bargains for the sale of ordinary goods, and the machinery of equity which works justice in the case of contracts for land is too slow and expensive to be a desirable, if it were a possible, remedy for any and every sale of goods. Mercantile convenience demands a short cut, and the effect of the American rule is to enable the injured seller himself to assume the functions of a court of equity and foreclose the rights of the buyer if he is substantially in default. However, the seller acts at his peril. The buyer must be in such default as to justify the seller's action. Instead of throwing the responsibility on a court of equity he must assume it himself, and he may have his choice of a strict foreclosure, whereby he regains title to the goods, or of a foreclosure by sale.

[2] Parker *v.* Palmer, 4 B. & Ald. 387.

and the burden is on the defendant to allege and prove the existence of the collateral stipulation. To go farther than this, however, is to confuse matters of form with matters of substance. The remedy of rescission, if allowed at all, is allowed on broad principles of justice. The basis of the remedy is that the buyer has not bought what he bargained for. In early times, the court said that what one party to a bilateral contract bargained for was the obligation of the other, and that if he got that obligation he could not complain because the obligation was not performed. This is unquestionably sound argument, if the form of the transaction is to govern; but since the time of Lord Mansfield, courts have no longer been willing to dispose of the matter on so technical a ground. It is apparent that the real thing bargained for was the performance, and that the obligation was merely a means to that end. Consequently, with limitations that need not now be considered, courts have allowed the defendant to refuse to perform, because the plaintiff had refused or failed to perform on his part. Similarly, in the case under discussion, it is obvious that when a buyer buys a horse, warranted sound, the real thing he is after is a sound horse. It is the performance of the warranty, not damages for the breach of it, which is in his mind. He does not want an unsound horse, worth half the money, and the difference in damages. He wants to be perfectly sure that he is getting a sound horse, and if the one transferred to him is not sound, he is as truly forced to perform a bargain which he never intended to make, as is any defendant, if compelled to perform his part of a contract when the plaintiff is materially in default.

When the question is considered from the standpoint of practical applications, the advantages of the Massachusetts rule are manifest. The advantages are twofold: first, greater justice; second, the avoidance of the necessity of determining certain very troublesome questions of fact in order to settle a buyer's rights. The facts in the recent case of Varley *v.* Whipp [1] illustrate to some extent both advantages. The defendant agreed to purchase a specific second-hand reaping-machine which was in the seller's possession in another town. The seller assured the buyer that the machine was new and had been used to cut over only about fifty acres. By the bargain the machine was to be delivered on the cars at the seller's residence. The statements made about the machine were

[1] [1900] 1 Q. B. 513.

not true and the defendant rejected it. The court held that he was justified in so doing. This result is certainly to be commended. Any rule which would compel the buyer to take the machine and an action for damages would do violence to the usages and expectations of ordinary business men under such circumstances. Yet it may be doubted if the court in order to protect the defendant and yet maintain its theory of warranties did not find itself obliged to confuse important distinctions. The Sale of Goods Act provides (section 13) that "where there is a sale of goods by description there is an implied condition that the goods shall correspond with the description." Channell, J., said:

"The term sale of goods by description must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. . . . If a man says that he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year-old horse in the last stall, and there is a horse in the last stall but it is not four years old. But if he says he will sell a four-year-old horse, and there is a four-year-old horse in the stall, and he says that the horse is sound, this last statement would be only a collateral warranty."

Yet this was certainly a sale of specific goods, or, as the Act defines that term, "goods identified and agreed upon at the time a contract of sale is made." The parties were speaking of a particular machine, and the machine put on the cars was the machine in regard to which the parties were dealing. It did not possess all the qualities the seller asserted, but to say it was not the machine the parties were talking about is to confuse the attributes of the thing sold with the thing itself. In short, it is hard to see why the title to the machine did not pass not later than when it was put on the cars according to the contract. The facts may be varied slightly. Suppose the buyer had casually seen the machine a week before, when he was not thinking of purchasing, and the seller agreed to sell the buyer "that machine you saw," inducing the sale by false statements in regard to the machine. It would be as harsh as in the actual case to make the buyer keep the machine, yet surely there the court could not say that the sale was by description, or that there was a failure to identify the thing sold.

Even if the reasoning of the decision be supported, it is evident that the English court will have to take very nice distinctions in order to determine when there is a sale with warranty, and

when the sale fails because the goods do not comply with the description. If the contract is to sell a sound four-year-old horse in the last stall, title will not pass apparently, but if the contract is to sell a four-year-old horse which the buyer says is sound, there is a sale with a collateral warranty. In view of the careless way that oral bargains and even written bargains are worded, it is evident that the questions will be very difficult, and the answers bear little relation to the intention of the parties, for the parties mean the same thing whichever way they happen to express themselves.

It is at all times a troublesome question in the law of sales to determine when title passes and when it does not — so troublesome that often nothing but litigation can determine it. If the distinctions taken in Varley *v.* Whipp are sound, the difficulty is increased. For some purposes it is necessary to decide whether title has passed, difficult as the question may be, but it is certainly a clear, practical advantage if, in a given situation, the same rule is applicable whether title has passed or not. Under the Massachusetts rule not only are the fine-spun distinctions between conditions and warranties unimportant, but in this connection it makes little difference whether title has passed.[1] If the seller has promised in any form that the goods possess some quality and they do not, the buyer may refuse to take the goods if he has not already taken them, and may return them if he has previously received them. He may refuse to pay the price if he has not already paid, and if he has paid it he may recover it. The simplicity of the rule is perhaps its greatest merit.

If a sale is induced by fraudulent statements, rescission is admittedly proper.[2] And if a seller knows of the falsity of the statements he makes which constitute a warranty, he is fraudulent. The morality of taking advantage afterwards of false statements innocently made, by insisting on retaining the advantage of a sale induced thereby, is almost as questionable as that of making knowingly false statements to bring about the sale. It is a difficult question of fact, and one which arises in very many cases of broken warranty, how far the seller knew that his warranty was

[1] There seems to be one difference. If title has not passed and goods are offered which do not comply with the seller's agreement, the buyer may not only reject the goods, but may sue the seller for damages. If title has actually passed, though the buyer may at his option reject the goods, or keep them and sue for damages, the authorities do not seem to allow him both rights. If he rescinds the sale, he cannot recover damages.

[2] See Mechem, § 932 and cases cited.

false. It is clear gain if this question also becomes immaterial, as it does in Massachusetts and other states allowing rescission for breach of warranty.

The English rule represents in truth a partial survivorship of the principle of *caveat emptor*. This remnant of the doctrine may well be swept away, as the more obviously barbarous applications of the doctrine have already been.

Samuel Williston.